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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner,

vs.

EPIMENIO MORENO and ROQUE ARANDA,
Respondents.

Respondents' Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

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vs.

EPIMENIO MORENO and ROQUE ARANDA,
Respondents.

Respondents' Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

THE QUESTION PRESENTED

I. **Moreno vs. Southern Pacific Company.**

A. **DOES THE FEDERAL EMPLOYERS' LIABILITY ACT (45 USC 51) APPLY TO A RAILROAD SECTION HAND ENGAGED IN HELPING CONSTRUCT A SUBSTITUTE YARD FOR SWITCHING AND CLASSIFYING RAILROAD CARS ON A MAJOR RAILROAD ARTERY OF INTERSTATE COMMERCE?**

STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a Delaware Corporation, doing business as an interstate carrier of passengers and freight for hire by railroad. Near the City of Roseville, Placer County, California, it maintains certain switching yards and tracks used in connection with its said business (Cl. Tr., page 2).

On some date during April, 1951, Petitioner commenced construction at Roseville, California, of what is known as a retarder yard. The purpose of this retarder yard was to better facilitate the movement of its interstate freight trains. (Rep. Tr. 2, page 6). Prior to the construction of the retarder yard switching was done by switch engines. The retarder yard enabled Petitioner to change to "gravity" switching, with a resulting economy in operations. The retarder yard was an improvement over the previously existing method of switching (Rep. Tr. 1, page 7).

A main line of the Southern Pacific Company runs from Sacramento, California to Reno, Nevada, and points eastward. The old main line which existed adjacent to the place the retarder yard now stands was removed and a new main line constructed in connection with the retarder yard project (Rep. Tr. 1, page 8). To construct the new retarder yard new tracks for freight trains had to be laid. To construct these new tracks some of the ties from the old main line were used (Rep. Tr. 1, pages 46, 47), (Rep. Tr. 2, page 84).

On October 3, 1951, the Respondent employed Petitioner as one of its workmen to help do the common labor connected with the construction of the retarder yard (Rep. Tr. 1, page 44). Between October 3, 1951, and December 19, 1954, Respondent worked continuously at such labor in the retarder yard and spent about fifteen days on the

main line "tramping" ties (Rep. Tr. 1, page 49). On three prior occasions he had worked as a section hand for Petitioner maintaining and repairing existing interstate rail lines (Rep. Tr. 1, page 43).

On December 19, 1951, while employed by Petitioner as aforesaid at Roseville, California, Respondent was called upon to guide a 1400 pound rail being lifted by a crane so that it could be placed into position on a new track bed (Rep. Tr. 2, page 86). There were three men working as a team in this operation. One operated the crane and one was on each end of the rail (Rep. Tr. 2, page 9). The track was being built at a point which required the men to work in mud and water. The men wore eight-inch boots (Rep. Tr. 2, page 32).

While a rail was being lifted into position by the crane, and while it was being guided by Respondent and a fellow employee, for some reason it became unbalanced, and the end opposite Respondent went forward at a faster rate. The crane operator noticed this, and without any signal or other warning to Respondent, lowered the rail to the ground suddenly, where it landed upon Respondent's foot, injuring it. At about the moment the rail was being lowered, Respondent's foot slipped on a piece of metallic material (Rep. Tr. 2, page 93). In the ordinary course of their operations the crane operator would wait for a signal from Respondent before lowering the rail. On this occasion the rail was lowered without any such signal. The signal had not been given because the rail was still about eighteen inches from the rail bed where it was supposed to be placed (Rep. Tr. 2, pages 93-94).

Respondent suffered a crushing type foot injury resulting in fracture of the second and third metatarsals. The fracture extended into the metatarsal-cuneiform joint.

Motion in the joint is accompanied by pain. The joint will never be a good joint again (Rep. Tr. 2, pages 14, 15, 16).

ARGUMENT

I. The Federal Employers' Liability Act (45 USC 51) Applies to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Railroad Cars on a Major Railroad Artery of Interstate Commerce.

A. THE ACT IN QUESTION.

The pertinent section of the Act involved in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act." 53 Stat. 1404, 1939.

Thus, an employee may invoke the Act if any part of his duties (1) furthers interstate commerce or, (2) directly or closely and substantially affects such commerce.

B. PURPOSES OF THE ACT.

Prior to 1939, the Federal Employers' Liability Act covered only those employees of a carrier who, at the "moment of injury" were engaged in interstate commerce or work so closely related thereto that it was practically a part thereof. 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. In order to eliminate such confusion Congress, in 1939, amended the Act to eliminate the "moment of injury test." Congress intended to extend the coverage of the act to borderline railroad occupations. 10 ALR 2d 1282.

1283; *Edwards v. Baltimore & Ohio R. Co.*, 134 F. 2d 366; *McLeod v. Threlkeld*, 319 U.S. 491; *Southern Pacific Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act is now almost all-inclusive. *Taylor v. Lumaghi Coal Co.*, 352 Mo. 1212, 181 S.W. 2d 536; *Wright v. N. Y. Cent. R. Co.*, 263 App. Div. 461, 33 N.Y. Supp. 531, Cert. denied 317 U.S. 668. In order to effectuate the purposes of the Act the Courts should give it a liberal interpretation in favor of its application to any given case. *Ermin v. Penn. R. Co.*, 36 F. Supp. 936; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

C. THE ACT AS APPLIED TO THE FACTS OF THE CASE AT BAR.

(1) Did the duties of Respondent as a section hand, cause him to further interstate commerce?

The affirmative answer to the above inquiry dictated by the facts of this case may not be logically evaded. The testimony of Mr. William F. Turner, Construction Division Engineer of the Petitioner is as follows on this point:

Mr. Colley: "Do you have knowledge as to the purpose of the project?"

Mr. Turner: "Well, the purpose is to speed up the classification of cars and certain economies to be effected."

Mr. Colley: "In other words, the purpose of the project, then, stated another way is to better facilitate the movements of the Southern Pacific Company's trains?"

Mr. Turner: "Freight trains, yes."

Mr. Colley: "Freight trains?"

Mr. Turner: "Freight trains."

Mr. Colley: "These freight trains whose movements this project is intended to facilitate come from over all lines?"

Mr. Turner: "Yes, they come from all over."

Mr. Colley: "When I refer to all over lines, I have reference to out of State, for instance."

Mr. Turner: "Yes, they come from the east."

Mr. Colley: "When you say 'east' just where do you have in mind?"

Mr. Turner: "Well, they come from anywhere in the east, Ogden, Chicago, New York."

Mr. Colley: "You mean Ogden, Utah, Chicago, Illinois, and New York, New York?"

Mr. Turner: "Yes, and many other places."

. . . . . .

Mr. Colley: "So this project then, was an improvement in the switching operations over an existing method of switching, is that right?"

Mr. Turner: "Well, it was — of course, this was a brand new project, and it facilitated switching." (Rep. Tr. 1, pages 6 and 7).

Thus, it is clear that any company employee, including Respondent who helped construct the project was engaged in an activity which furthered interstate commerce since the purpose of the project was to facilitate switching operations of freight trains operating in interstate commerce.

(2) Was Respondent, as a section hand, engaged in an activity which closely, directly or substantially affects interstate commerce?

Again, the answer must be in the affirmative. Respondent and his fellow employees tore up the old main line in the area of the new retarder yard and laid a new one. The very day of his injury Respondent was engaged in helping lay a track which used cross ties from the old main line as well as some new ones. In essence, he was repairing the tracks. The cases quite uniformly hold that repair activities are covered by the Act. *Shelton v. Thomson*, 148 F 2d 1; *Zimmermann v. Scandrett*, 57 F Supp. 799; *Mills v. Terminal R. Ass'n.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 Pac. 2d 342; *Marie v. Gulf M. & O. R. Co.*, 219, S.W.

322; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284; 10 ALR 2d 1273.

(3) Assuming, for purposes of argument only, that Respondent was working on an entirely new project, the applicability of the Act in this case would remain. The true test of its applicability is affect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*, 177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N.Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. See also *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

II. It Was Reversible Error for the Trial Court to Render Judgment Notwithstanding the Verdict Since There Was Substantial Evidence to Support the Verdict of the Jury.

On a motion of judgment notwithstanding the verdict, the trial Court must disregard all conflicts in the evidence, and draw every reasonable inference therefrom which favors support of the verdict of the jury. Few rules are more well settled in our law.

Hunt v. United Bank & Trust Co. (1930), 210 Cal. 108;

Card v. Boone (1930), 210 Cal. 200;

Ferran v. Southern Pacific Co. (1935), 3 Cal. 2d 350;

Finkler Estate, 3 Cal. 2d 584 (1935);
Neel v. Mannings, Inc. (1942), 19 Cal. 2d 647;
Been v. Lammus Co. (1946), 76 Cal. App. 2d 288;
Docherty v. Key System (1947), 80 Cal. App. 2d 888;
Devens v. Goldberg (1948), 33 Cal. 2d 173;
Champion v. Bennetts (1951), 37 Cal. 2d 815;
Tice v. Kaiser Co. (1951), 102 Cal. App. 2d 44.

Respondent alleged in his complaint, and offered evidence tending to prove that Petitioner was negligent in two particulars. It was charged that the crane was negligently operated, and also that Respondent was not provided with a safe place to work.

A. NEGLIGENT OPERATION OF CRANE.

The best evidence of the negligent operation of the crane came from the crane operator, Mr. Coe, a witness for Petitioner. We quote:

Mr. Colley: "Mr. Coe, you said when you saw Moreno, the rail was on his foot, is that right?"

Mr. Coe: "That's right."

Mr. Colley: "You didn't see him slip?"

Mr. Coe: "I didn't see him slip until the rail was on his foot." (Rep. Tr. 2, pages 143, 144).

* * * * * * *

Mr. Colley: "And did you see Moreno at all times while he had the rail?"

Mr. Coe: "I did." (Rep. Tr. 2, pages 147-148).

It appears from the above that the crane operator could not have lowered the rail onto the foot of Respondent except through negligence. His failure to exercise ordinary care in the operation of the crane was negligence. *Spear v. Leuenberger*, 44 Cal. App. 2d 236.

It must also be remembered that the rail was lowered to the ground without warning before it was in the usual position from which it should have been lowered. From this alone the jury could reasonably draw an inference of negligence on the part of Petitioner, acting through the agency of the crane operator.

THE QUESTION PRESENTED

I. Aranda vs. Southern Pacific Company.

A. DOES THE FEDERAL EMPLOYERS' LIABILITY ACT (45 USC 51) APPLY TO AN EMPLOYEE OF AN INTERSTATE COMMON CARRIER BY RAIL INJURED WHILE RE-MOULDING TRAIN WHEELS WHICH HAVE BEEN WORN OUT IN USE ON INTERSTATE TRAINS?

STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do and engaged in doing business as a common carrier of passengers and freight for hire in the State of California and other states.

At Sacramento, California, Respondent owns and maintains various tracks, switching yards, store houses, and repair facilities for trains operated in interstate commerce, an iron foundry, a brass foundry, a wheel foundry, and passenger and freight stations.

Since the year 1939, Respondent, Roque Aranda, has been employed by Petitioner as a wheel moulder in its wheel foundry in Sacramento, California (Rep. Trans. of 12-11-51, proceedings pp. 54, 55). As such moulder, he assisted in the remoulding of cast iron wheels. These remoulded wheels are remoulded from old wheels removed from freight cars operating in interstate commerce (Rep. Trans. of 12-11-51, proceedings pp. 52, 53). The old wheels which provide the

metal for the wheel foundry at Sacramento may come from anywhere on Petitioner's lines, which lines extend from Sacramento, California, north to Portland, Oregon, northeast to Ogden, Utah, southeast to El Paso, Texas, south to the Mexican border, and west to San Francisco, California (Rep. Trans. of 12-11-51, proceedings p. 10). Thus, for example, when a wheel becomes unserviceable in Portland, Oregon, Ogden, Utah, or El Paso, Texas, it is shipped by one of Petitioner's interstate trains to the Sacramento foundry for "repair", the "repair" process being one of remoulding the wheel (Rep. Trans. of 12-11-51, proceedings pp. 12, 13).

The old wheels removed from freight cars (because they are no longer serviceable) are delivered to the foundry by means of flat cars upon which they have been loaded. The flat cars come to the Sacramento wheel foundry from various sources both within and from outside the State of California. When the wheels have been remoulded at Sacramento, California, some of them are sent on flat cars directly to Ogden, Utah, and Portland, Oregon, where axles are affixed to the wheels (Rep. Trans. of 12-11-51, proceedings p. 63). Others are hauled by means of a straddle truck to the stores department of Petitioner to be stored for use as the need arises (Rep. Trans. 12-11-51, proceedings, p. 64). Petitioner maintains a spur track directly connecting its foundry with its main track leading to Portland, Oregon, and other similar centers (Rep. Trans. of 12-11-51, proceedings pp. 24, 25, 62).

Upon completion of the assembly of the axle unit in Portland or Ogden the wheel and axle are returned by the interstate railroad of Petitioner to its Sacramento, California repair shop. Here it is fitted upon trains as needed, some going on entirely new cars being assembled in Sacra-

mento by Petitioner, and others being placed upon old cars as repairs (Rep. Trans. of 12-11-51, proceedings pp. 24, 25, 26, 27). The repaired cars go wherever the need arises, be it Roseville, California, or El Paso, Texas, and/or points in between.

The Petitioner and the industry in general knows of no feasible way of repairing used or worn cast iron wheels except to remould them. Thus, Petitioner conducts its remoulding process at its Sacramento, California, wheel foundry (Rep. Trans. of 12-11-51, proceedings p. 50), where approximately 84% of all wheels used on its freight trains are remoulded from old wheels (Rep. Trans. of 12-11-51, proceedings pp. 16, 17).

On the 12th day of June, 1950, Respondent was severely burned by molten metal while preparing to pour it into a mould at Petitioner's Sacramento wheel foundry (R. 69, 15, 54). At the time of his injury, the ladle containing hot melted iron had been hooked onto a cable (R. 18, 19), and lifted up and suspended above a mould in the inner circle of moulds (R. 38). When the ladle was approximately six or seven inches above the mould, the cable slipped from its anchored end on the boom and caused the ladle to hit the mould and overturn on its side resulting in the spilling of its content of molten material (R. 89, 90).

After the molten metal was spilled on the ground as a result of the slippage of the cable from its anchored position, Respondent sought to escape from the molten material (R. 37, 45), but found an obstruction at the nearest normal exit in the form of a platform left there by another employee of Petitioner (R. 106, 107, 108, 109, 110). He turned right and sought to jump over the ring of moulds, and in doing so landed in the spilled molten metal and suffered the above referred to burns (R. 37).

ARGUMENT

The Federal Employers' Liability Act (45 USC 51) Applies to an Employee of an Interstate Common Carrier by Rail Injured While Re-Moulding Train Wheels Which Have Been Worn Out in Use on Interstate Trains.

The pertinent section of the Act as amended in 1939, applicable in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act." 53 Stat. 1404, 1939.

Thus, it appears that an employee may invoke the act if any part of his duties (1) further interstate or foreign commerce (2) or directly or closely and substantially affect such commerce.

Prior to the 1939 Amendment, the Federal Employer's Liability Act covered only those employees of a carrier who, at the moment of their injury, were engaged in interstate commerce or work so closely related thereto as to be practically a part of such commerce. See 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. Thus, Congress amended the Act in 1939 to end the confusion resulting from the efforts of courts to apply the strict "moment of injury" test to every case. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F.2d 366; *McLeod v. Threlkeld*, 219 U.S. 491, 87 L.ed 1538, 63 S.Ct. 1248; *Southern Pac. Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act as amended in 1939 is now almost all inclusive, and fine distinctions are no longer necessary. Prior to the amendment, many cases turned upon some slight differentiation in duty or operation, more apparent, than real, with much hair splitting and little certainty. Thus, it was to avoid all this and to give a fixity of application that Congress amended this Act to include any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce. See *Wright v. New York Cent. R. Co.*, 263 App. Div. 461, 33 NYS 2d 531, cert. den. 317 U.S. 668. See also *Taylor v. Lumaghi Coal Co.*, 353 Mo. 1212, 181 S.W. 2d 536, for similar direct furtherance of interstate work concept.

In the principal case the Respondent's duties as a moulder of wheels caused him to further interstate commerce. Practically every one of Petitioner's interstate freight trains run on wheels made in its Sacramento wheel foundry (Rep. Trans. of 12-11-51, proceedings pp. 16, 17). Thus, not only is interstate commerce furthered by the duties of Petitioner, it is made possible by such duties. As one learned Court profoundly observed, no train may run without wheels, even in interstate commerce. *Shelton v. Thomson*, 148 Fed. 2d 1. In the *Shelton* case, the Plaintiff was employed to operate a crane used in lifting train wheels in a repair shop. The Act was held to apply to him.

Surely, without the operations performed by Respondent and others in Petitioner's foundry at Sacramento, its repair shop activities at Portland, Oregon, and other places would be paralyzed.

Petitioner attempts to make a distinction between "manufacturing" and "commerce". In arriving at a decision in the case at bar the Court need not draw any such line between that which is manufacturing and that which is commerce.

The applicable law makes the Petitioner liable if (1) any part of Respondent's duties further interstate commerce, or (2) any part of his duties substantially or closely affect such commerce. Thus, if we assume, for purposes of argument only, that Respondent was on the date of the accident engaged in manufacturing or production, the Petitioner is liable just the same.

The Courts make no apparent effort to distinguish between manufacturing and commerce. Thus, a blacksmith's helper engaged in making new strap hangers to be used by Defendant interstate railroad as replacement parts for its trains has been held to be covered by the Act. *Trucco v. Erie R. Co.*, 45 A.2d 20, Cert. denied 328 U.S. 843. Also, an employee running a forging machine for manufacturing small new parts for trains withdrawn from interstate commerce also has been held to be protected by the Act. *Baird v. N. Y. Cent. R. Co.*, 86 N.E. 2d 567.

Petitioner seeks also to suggest that the Act has no application to "new" construction but from the foregoing paragraph it may be seen that if an employee making new strap hangers as replacement parts for interstate trains, and one who makes new parts on a forging machine are protected by the Act, there is no method of reasoning by which Petitioner may successfully exclude Respondent. Could it be that new strap hangers for trains further interstate commerce or more substantially affect such commerce than train wheels? Most trains could probably run in interstate commerce without strap hangers, but few, if any, could run without wheels. Moreover, the true test of the applicability of the Act is its effect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*,

177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N. Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. For a case indicating a liberal interpretation of the Act, see *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

It should be borne in mind that all of Petitioner's activities are handled under one parental roof and it is not a corporation solely engaged in the remoulding of car wheels. Here the whole chain of activity started with the taking off of the old car wheels, which were worn out, the transferring of those old car wheels into a furnace where they are melted down, the pouring of this new melted material into remoulding units, the creation of the remoulded car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars operating in interstate commerce. Surely, this is to be treated as one single operation for all practical purposes and all under the general control of Petitioner in a manner obviously directly and substantially affecting interstate commerce.

Further, assuming without admitting the necessity for showing Petitioner's activity at the wheel foundry to be one of "repair" rather than "manufacturing" to bring this case at bar within the terms of the Act, it seems to be self-evident that no wheel can be "manufactured" until some car needs "repair". The foregoing statement is extremely

pertinent here in view of the fact that no molten material can exist without the prior existence of the worn out wheels. Without the first worn out wheel there can be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not break the chain of causality between the creation of the remoulded wheels and their running on interstate railroad tracks, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacturg". The entire procedure of remoulding looks forward to and is created for the purpose of repairing the freight cars which become unserviceable due to the need for repair of its wheels.

The duty of Respondent is nothing more than to repair one of Petitioner's instrumentalities of interstate commerce, temporarily withdrawn from such commerce, so that it may be returned to the commerce from which it has been temporarily withdrawn. The only way to repair a worn cast iron freight train wheel is to melt it down and remould it. Petitioner's foundry is essentially a repair shop, and the cases quite uniformly hold that repair shop activities are covered by the Federal Employer's Liability Act. *Shelton v. Thomson*, 148 Fed. 2d 1; *Zimmermann v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 P. 2d 342; *Maxie v. Gulf M. & O. R. Co.*, 219 S.W. 322; 10 ALR 2d 1273; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

CONCLUSION

It is submitted that in both the *Moreno* case and the *Aranda* case what we have is really repair and maintenance activity. In one instance worn out train wheels were being repaired. In the other an existing method of switching and classifying railroad cars was being improved. Certiorari should be denied.

Respectfully submitted,

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